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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 381

STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, PETITIONER

v.

FEDERAL POWER COMMISSION

No. 382

NORTHERN NATURAL GAS COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion and order of the Federal Power Commission (R. V 2257–2314) is reported at 95 P. U. R. (N. S.) 289. The opinion of the United States Court of Appeals for the Eighth Circuit (R. VI 2433–2497) is reported at 206 F. 2d 690.

JURISDICTION

The judgment of the Court of Appeals was entered on July 20, 1953 (R. VI 2498). The petitions for writs of certiorari were filed on September 28, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1) and Section 19 (b) of the Natural Gas Act.

QUESTIONS PRESENTED

1. Whether, in determining just and reasonable rates under Section 5 (a) of the Natural Gas Act for sales of natural gas for resale admittedly subject to its jurisdiction, the Federal Power Commission may allow only the 5-cent-per-mcf actual cost of gas produced in Kansas by Northern Natural Gas Company, where such allowance does not result in confiscation, notwithstanding an order of the State Corporation Commission of Kansas requiring all producers of gas in Kansas to attribute an 8-cent-per-mcf wellhead value to all gas so produced.

2. Whether the court below properly affirmed the allocation of depreciation expense and property taxes, 50% to demand costs and 50% to commodity costs, made by the Federal Power Commission for the purpose of ascertaining the costs of operations subject to its rate jurisdiction.

3. Whether the court below properly affirmed the Federal Power Commission's finding that on the facts of record Northern Natural Gas Company's Rate Schedule IND–1 (purportedly relat-

ing to sales for resale for industrial use only) and Rate Schedule IND–2 (purportedly covering sales of gas to distributing companies for their own use) did not concern transactions identifiably separate from Northern's sales for resale generally, and hence were subject to the Commission's jurisdiction and suspensible under Section 4 (e) of the Natural Gas Act.

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act (52 Stat. 821, 15 U. S. C. 717, *et seq.*) and of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. 1001, *et seq.*) are set out in the Appendix, *infra,* pp. 26–31.

STATEMENT

Northern Natural Gas Company (Northern), is a "natural-gas company" within the meaning of Section 2 (6) of the Natural Gas Act (R. VI 2436). It operates an integrated natural gas pipeline system originating in the natural gas fields of Kansas, Oklahoma, and Texas (R. VI 2436, cf. map at R. V 2073). At the close of the year 1950, Northern produced about 20% of the gas sold by it and purchased the remaining 80% from other producers (R. VI 2436). At that time Northern served from its interstate pipeline system 27 nonaffiliated distributing utility companies and a wholly owned—but since absorbed—subsidiary which served some 225 cities and towns (R. VI 2436). Among its other customers were

16 large-volume, direct industrial customers (R. VI 2436). Northern's sales to the 27 distributing utilities and its subsidiary represented 91% of its sales (R. IV 2436).

On March 27, 1950, Northern filed with the Federal Power Commission, pursuant to Section 4 (d) of the Natural Gas Act, *infra*, pp. 26–27, rate filings by which it sought to increase its rates by approximately $3,200,000 (R. VI 2437). In accordance with Section 4 (e) of the Act, *infra*, pp. 27–28, the Commission suspended these filings for the five months allowed and thereafter permitted them to go into effect under bond and subject to refund (R. V 2215–2220). On October 27, 1950, Northern filed additional rate filings proposing a further increase of approximately $5,200,000 (R. VI 2437).[1] The Commission suspended these filings under Section 4 (e) for the statutory period and thereafter permitted them also to go into effect under bond and subject to refund (R. V 2235–2238). Hearings on the two applications were consolidated (R. VI 2437). The State Corporation Commission of Kansas intervened in the proceedings in November 1950 (R. I 2). The Federal Power Commission, after hearings, briefs and oral argument, issued its Opinion No. 228 and

[1] A third rate filing increasing Northern's charges to its customers by an additional $10,600,000 was filed on December 26, 1951 (R. VI 2438). No additional questions as to this filing are raised in the petitions for certiorari and consequently the facts it involves will not be set out separately.

order on June 11, 1952 (R. V 2257–2314), granting Northern rate increases amounting to approximately $5,000,000 (R. VI 2437). Petitions for rehearing filed by Northern and the State Corporation Commission of Kansas were denied except for one item which is irrelevant here (R. VI 2438).

Petitions for review were filed by Northern and the Kansas Commission in the court below (R. VI 2441–2443); the former pressed ten errors allegedly committed by the Commission (R. 2441–2442); the latter raised two issues (R. VI 2442–2443). The Court of Appeals affirmed the Commission's order in all respects except as to the rate of return.[2] The petitions for certiorari seek review of three of the issues on which the Court of Appeals affirmed. The facts pertinent to these issues are as follows:

1. *The State of Kansas Attribution Order.* As part of its integrated operations, Northern produces natural gas in the Hugoton Field, in the State of Kansas. This gas is commingled with that purchased by Northern, and after transporta-

[2] The Court held that the Commission had not made sufficient subsidiary findings to support its allowance of a 5½% rate of return and remanded the case to the Commission for further proceedings on this issue (R. VI 2492–2493, 2498). The Commission believes this action to be erroneous and intends to file a conditional cross-petition for a writ of certiorari on this question. The time within which to file this petition has been extended to and including November 17, 1953, by order of Mr. Justice Clark, dated October 8, 1953.

tion in interstate commerce, is sold to distributing companies for resale.

On February 21, 1951, the Corporation Commission of the State of Kansas issued an order,[3] assertedly for the purpose of conservation of natural gas, in which it required that all persons who have taken gas from the Hugoton Field since March 1, 1949 "attribute to all gas taken * * * for all purposes * * * the fair and reasonable minimum value of not less than eight (8) cents per thousand feet at the wellhead."[4]

In determining the just and reasonable rates for Northern's sales for resale under Section 5 (a) of the Natural Gas Act, *infra*, pp. 28–29, the Federal Power Commission rejected the claim of Northern and the Kansas Commission that it was bound by the value set by the Kansas attribution order. Instead, the Power Commission adhered to its customary method of determining rates on the basis of actual costs incurred, and allowed only the actual costs of about 5 cents per mcf

[3] The order was amended *nunc pro tunc* on March 8, 1951 (R. III 1499–1501).

[4] The order was preceded by an order dated February 18, 1949 (R. III 1325–1333), which differed from the 1951 order in that it did not require the attribution of 8 cents per mcf "for all purposes" (R. VI 2452, fn.). While the validity of the original 1949 order was upheld by the Supreme Court of Kansas (*Northern Natural Gas Co.* v. *State Corporation Commission*, 169 Kan. 722, rehearing denied, 170 Kan. 341) (R. III 1423–1443, 1485–1491), no review had been sought of the 1951 order.

incurred by Northern in producing the gas[5] (see R. V 2299–2301, 2303–2310). The difference between Northern's actual cost and the artificial value under the Kansas order amounts to $1,914,574 (R. VI 2453).

The Court of Appeals agreed that the Federal Power Commission was not "bound to obey the Kansas Commission's order in performing [its] function of regulating Northern's rates" (R. VI 2453). It held that since "Congress has entered the field, exercised its power and authorized its Commission to regulate charges by natural gas companies for the gas they produce and sell in interstate commerce for resale, its mandate must prevail" (R. VI 2456). Judge Johnsen concurred on the ground that the Kansas order had been complied with since the rates fixed by the Federal Power Commission resulted in charges in excess of 8 cents per mcf (R. VI 2493–2497).

2. *Allocation of expenses between regulable and nonregulable sales.* Inasmuch as Northern makes sales for direct consumption, which are not subject to regulation under the Natural Gas Act, as well as sales of natural gas for resale, which are regulable under the Act, it was necessary in determining just and reasonable rates for the regulable sales to allocate the total cost of service

[5] As to gas purchased by Northern in the Hugoton Field, the Federal Power Commission allowed the actual price paid as out-of-pocket expenditures (Pet. in No. 382, p. 9, R. V 2303).

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between the two kinds of business (R. VI 2461–2462).

In making this allocation, the Commission classified the various cost items into two categories: (1) costs which are constant or fixed, that is, costs which relate entirely or predominantly to the capital outlay necessary to provide the system capacity plus those operating expenses which do not vary materially with the quantity of gas transported through the pipeline system and (2) costs which vary with the volumes of gas transported through the transmission system. The Commission then assigned these costs to "commodity" and "demand" components, the former being allocated to customers on the basis of annual volumes of gas sold and the latter allocated in proportion to the Company's sales of gas to each customer during the period of maximum demand upon the system.

As a part of this allocation of the costs of service, the Commission allocated 50% of the fixed costs of depreciation expense and property taxes to "demand" and the remaining 50% to "commodity" (R. V 2284–2286, 2287). In explaining its allocation of fixed costs, with particular reference to depreciation expense, the Commission referred to its then recent decision in *Re Atlantic Seaboard Corporation,* 94 P. U. R. (N. S.) 235, 246, where it had been pointed out that "the capital outlay for the pipeline facility is made—and justified—not only for service on the peak

days but for service throughout the year. * * * It follows that reasonably accurate results can be achieved only by allocating the fixed expenses flowing from the capital outlay to both operating functions, *viz*, capacity and volume" (R. V 2283).

Rejecting Northern's argument that both of these expenses should be charged 100% to demand, the Court of Appeals recognized that "The Commission here applies its expert judgment, it has informed the court of the reasons for its action, and the action itself is not so unreasonable that it calls for reversal. The Commission has exercised its 'judgment on a myriad of facts', and it is not for the court to overrule that informed judgment" (R. VI 2467; see also R. VI 2469, 2470).

3. *Suspension of Rate Schedules IND–1 and IND–2.* Included among the rate filings of March 27 and October 26 which the Commission suspended under Section 4 (e) of the Act, *infra*, pp. 27–28 (see *supra*, p. 4), were Rate Schedule IND–1, purportedly applicable to gas delivered to distributing utilities for resale for large industrial use only (R. V 2170, 2213), and Rate Schedule IND–2, purportedly applicable to gas delivered to the utilities for their own large-volume industrial use only (R. V 2171, 2214). The Commission found that Northern delivered gas to distributing companies in bulk without earmarking for any particular customer or use and that Northern made no sales for resale for industrial use only or for

the distributing company's own use, despite Northern's attempt to set up separate schedules for such sales (R. V 2263). In addition, the Commission found that, since the IND Schedules contained one component of the two-part rate, *i. e.*, the commodity charge, these schedules were only partial schedules and were dependent, not only for the demand charge but also for Northern's obligation to deliver, upon Northern's general CD–1 Schedule. The latter Schedule, which related to sales of natural gas for resale for all uses, was admittedly subject to Commission regulation and suspensible under Section 4 (e) (R. V 2262–4). Accordingly, the Commission concluded that the IND Schedules, inseparable from CD–1, were also within its jurisdiction and suspensible along with that Schedule (R. V 2264).

In affirming this conclusion of the Commission, the Court of Appeals stressed the fact that at the time the gas was delivered to the distributing utilities there was no way of determining the use to which it would be put (R. VI 2446) and the further fact that there were no essentially separate transactions covering the gas directly consumed by the utilities or by large-volume industrial users (R. VI 2444–2451).

ARGUMENT

1. *The Federal Power Commission is not bound by the attribution order of the State of Kansas.* (a) The State Corporation Commis-

sion of Kansas and Northern contend that, in fixing just and reasonable rates for Northern's sales for resale in interstate commerce, which are concededly subject to its exclusive jurisdiction, the Federal Power Commission should have allowed an attributed value of 8 cents per mcf, as provided in the Kansas Order, for the gas Northern produces itself in the Hugoton Field. The argument is not predicated on any claim that the 8 cents represents Northern's actual cost; on the contrary, it is undisputed that the actual cost was the 5 cents allowed by the Federal Power Commission. The contention is simply that the Federal Power Commission was required to allow 8 cents per mcf, although it would artificially inflate Northern's cost of operation by nearly $2,000,000 per year, solely because that value is fixed by the attribution order of the Kansas Commission. The position is invalid for several reasons.

This Court has often held that in reviewing rates fixed by the Federal Power Commission under the Natural Gas Act, it is not concerned with the method used by the Commission in reaching its result, but rather with whether the rate fixed is fair and reasonable or confiscatory. *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 585; *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 602; *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 U. S. 581, 603; *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 324

U. S. 635, 649. Since there is no claim that the rate fixed by the Commission is confiscatory (see R. V 2265), it would be immaterial if the method used by the Commission in reaching its end result had infirmities.

But there is, in any event, no such infirmity as petitioners suggest. Their contention is in effect merely a revival—and indeed an extension[*]—of the "fair value" argument which the Commission, with this Court's approval, has consistently rejected. *Colorado Interstate Gas Co.* v. *Federal Power Commission,* 324 U. S. 581, 597–605; *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission,* 324 U. S. 635, 648–649; *Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U. S. 591, 607–615; *cf. Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.,* 337 U. S. 498, 505–507. For example, in the *Colorado Interstate* case, the pipeline company involved claimed that in fixing the rates for the company's sales for resale the Commission was barred by Section 1 (b), *infra,* p. 26, from including the company's production and gathering facilities in the rate base and should therefore allow "field price" or "market value" of the gas which the company produced itself, rather than its actual cost. This Court, squarely rejecting that contention, held that the Commission was not pre-

[*] The 8-cent valuation sought to be attributed to the gas produced by Northern is not a competitive price but one artificially fixed by the Kansas Commission.

cluded "from reflecting the production and gathering facilities of a natural gas company in the rate base and determining the expenses incident thereto for the purposes of determining the reasonableness of rates subject to its jurisdiction" (324 U. S. at 603).[7] As the court below stated, the cases establish that "Congress has vested power in the Federal Commission to regulate in the national interest the charges natural gas companies may make for the gas they sell in interstate commerce for resale and that in accomplishing the regulation the Commission is free from the compulsion of giving any weight to the element of value of the companies' gas at the wellheads" (R. VI 2455–2456).

It seems clear, then, that the Commission applied settled principles in using the actual cost to Northern in determining rates for Northern's sales. Following these principles, the Commission allowed costs of 8 cents per mcf where Northern purchased gas at this price from other producers in the Hugoton Field (see Pet. in No. 382, p. 9). It was equally within the Commission's power to allow only the 5-cent actual cost, rather than an artificial "attributed" value of 8 cents, for the gas Northern produced itself.

[7] The Court pointed out that the indirect effect which valuation and rate-fixing methods might have upon the production and gathering facilities does not constitute an invasion of the exemption contained in Section 1 (b) for "the production or gathering of natural gas" (324 U. S. at 603–604).

Cities Service Gas Co. v. *Peerless Oil & Gas Co.*, 340 U. S. 179, on which petitioners rely (Pet. in No. 381, pp. 24–28; Pet. in No. 382, pp. 21–23), does not support their contrary view. This Court carefully pointed out in sustaining the Oklahoma order there involved that no question of conflict with the Federal Power Commission's authority under the Natural Gas Act was presented or decided. 340 U. S. at 188–189. If, as petitioners contend, there is a conflict here, it is resolved by elementary principles of federal supremacy. The Federal Commission, acting well within the scope of the power Congress conferred, has employed the repeatedly sanctioned standard of actual cost in fixing rates which are admittedly subject to its jurisdiction. There is no basis for petitioners' view that the federal power in this respect disappears because the State Commission has acted, and that the Federal Commission is bound by the Kansas attribution order to accept an artificial value as a component of the federally controlled rate.[8]

[8] *State of Wisconsin* v. *Federal Power Commission*, 205 F. 2d 706 (C. A. D. C.), pending on petitions for writs of certiorari, Nos. 280, 281, 418 this Term, relied on by petitioners (Pet. in No. 381, p. 29; Pet. in No. 382, pp. 23–24) deals with a different problem and has no relevance here. That case raises the question as to the Commission's jurisdiction over an independent producer or gatherer of natural gas which sells the gas for resale in interstate commerce at the end of production and gathering. Here, Northern's sales for resale, as well as Northern itself, are admittedly subject to regulation under the Act, and the question concerns the

It should be noted, however, that the supposed conflict with the Kansas Commission's order is highly questionable. That order has not been passed upon by the courts of Kansas. The earlier order involved in *Northern Natural Gas Co.* v. *State Corporation Commission*, 169 Kan. 722, rehearing denied, 170 Kan. 341, pressed by petitioners (Pet. in No. 381, p. 8; Pet. in No. 382, pp. 8, 15), required the attribution of 8 cents "for purposes of payment to producers, * * *" and not "for all purposes" as does the order here. The Kansas court in upholding the earlier order pointed out that the Federal Power Commission does not claim authority to fix a wellhead price for gas, thereby recognizing that the determination of cost of production as an incident of rate-fixing is a different matter from requiring attribution of a prescribed value at the wellhead. Recognition of this difference may well result in dissipation of the federal-state conflict petitioners assert. For, as Judge Johnsen noted in his concurring opinion (R. VI 2496), the rates Northern receives for its gas exceed 8 cents. And, as suggested both by the record in this case and the decisions involving a comparable Oklahoma order, this "realized price" may satisfy fully the Kansas

extent of the Commission's authority in determining just and reasonable rates for the sales. There is no question here, as there is in the *State of Wisconsin* case, as to regulation of sales to a pipeline company at the termination of the gathering process.

order as it is ultimately interpreted. See R. I 238; *cf. Phillips Petroleum Co.* v. *Oklahoma*, 340 U. S. 190, 191, 192, affirming 203 Okla. 35.

(b) Petitioners also complain of several alleged procedural defects in the portion of the Commission's order dealing with the Kansas attribution order, assertedly violative of Sections 8 (b) and 10 (e) of the Administrative Procedure Act, *infra*, pp. 30–31. Northern claims particularly that the Commission's order fails to set out the reasons why the Commission refused to exercise its discretion by following the Kansas order (Pet. in No. 382, pp. 22–25).

But Northern did not claim that the Commission should follow the Kansas order as a matter of discretion; it urged that the Commission was legally bound to follow that order. See R. V 2266, 2307–2308. Moreover, while the prevailing opinion of the Commission brushed Northern's contention aside with a minimum of discussion, the concurring opinions set forth in detail the reasons why the Kansas Commission could not, through its attribution order, interfere with the rate-making functions of the Federal Power Commission (R. V 2299–2301, 2303–2310). In the circumstances, Northern's argument that the opinion should have been more detailed is obviously without merit, as is the similar contention that the Commission was required to make more findings than it did (see Pet. in No. 382, p. 26), par-

ticularly since there was no factual dispute before the Commission.*

2. *The Court of Appeals properly affirmed the Commission's allocation of depreciation expense and property taxes.* Northern contends that the Commission had previously recognized that depreciation expense and property taxes, being fixed costs, were allocable 100% to capacity or demand, and that the allocation here, 50% to demand and 50% to volume sold or commodity, is unsupported by any substantial evidence other than "an engineer's theories of 'equity,'" violating Sections 8 (b) and 10 (e) of the Administrative Procedure Act (Pet. in No. 382, pp. 28–31).

(a) Basically, the problem of allocating costs is one of requiring each class of business to bear its fair share of the total cost of service. *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 U. S. 581, 588. The Natural Gas Act prescribes no allocation formula which the Commission must follow, and since rate-making

* Northern also complains that there is no finding that the rates would be unjust or unreasonable if the Commission allowed the 8-cent value fixed by Kansas (Pet. in No. 382, p. 23). Apart from the fact that such a finding is unnecessary under the method adopted by the Commission, the Commission's order expressly states (R. V 2265):

"The effect of Northern's contention would be to add a fictitious $1,914,574 to Northern's actual cost of service.

"Northern does not, and of course could not, claim that the $1,914,574 will be incurred by it, or that it represents cost. Nor does Northern contend, that disallowance of the claimed value would be confiscatory."

"is essentially a legislative function," the "courts are not warranted in rejecting the one which the Commission employs unless it plainly contravenes the statutory scheme of regulation. * * * [W]here, as here, several classes of services have a common use of the same property, difficulties of separation are obvious. Allocation of costs is not a matter for the slide-rule. It involves judgment on a myriad of facts. It has no claim to an exact science." *Id* at 589. "[C]onsiderations of fairness, not mere mathematics, govern the allocation of costs." *Id* at 591. See also *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission,* 324 U. S. 635, 645–646; *Cities Service Gas Co.* v. *Federal Power Commission,* 155 F. 2d 694, 705 (C. A. 10), certiorari denied, 329 U. S. 773.

Although the Commission had in some early cases allocated depreciation expense and property taxes 100% to demand, it has, as a result of further study and experience, modified its allocation procedures in order to attribute more equitably to each class its proper share of the costs. See *Re Atlantic Seaboard Corp.,* 94 P. U. R. (N. S.) 235;[10] *Re Colorado Interstate Gas Co.,* 95 P. U. R.

[10] In *Re Atlantic Seaboard Corp.*, 94 P. U. R. (N. S.) 235, the Commission spells out in detail the reasons why in its judgment fixed costs should be allocated 50% to demand and 50% to commodity. See 94 P. U. R. (N. S.) at 245–248. The Commission's opinion here reiterates some of these reasons and cites the *Atlantic Seaboard Corp.* case, quoting excerpts from that opinion. See R. V 2282–2286.

(N. S.) 97; *Re Mississippi River Fuel Corp.*, F. P. C. Opinion No. 234 (decided July 29, 1952).

The Commission allocated depreciation expense 50% to demand and 50% to commodity, because while the size of a pipeline is controlled to a considerable degree by the maximum loads it is planned to serve, it is used to transport gas not only at peak times but throughout the year. Accordingly, since each cubic foot of gas makes use of the pipeline, each should be required to bear its fair share of the costs, including part of the annual depreciation expense (R. V 2284–2285). As the Commission pointed out in *Atlantic Seaboard Corp.*, 94 P. U. R. (N. S.) 235, 245–246, its experience shows that the construction of a pipeline is justified as an economic matter by the service it is expected to provide throughout the year. See *supra*, pp. 8–9. It is for these practical reasons drawn from its experience in the field, and not on an engineer's theory of equity, that the Commission exercised its judgment to allocate depreciation expense 50% to demand and 50% to commodity. See *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 U. S. 581, 592.[11] Judicial review of the Commis-

[11] Since demand costs are allocated among customers on the basis of their peak demand, Northern's theory that depreciation expense should be allocated 100% to demand would result in firm customers bearing the full cost of the pipeline, while the nonregulable sales, typically interruptible, would obtain free transportation as far as demand costs are concerned, although the pipeline is used in connection with

sion's judgment in such a technical field is very limited, and since the Commission's action is not "devoid of reason," the court below properly affirmed. Cf. *Chapman* v. *Federal Power Commission,* 345 U. S. 153, 171.

(b) Although, as Northern urges (Pet. in No. 382, pp. 28–29), the Commission did not discuss its allocation of property taxes separately, this does not mean that Section 8 (b) of the Administrative Procedure Act has been violated. For the item of property taxes was merely one of several fixed costs (including depreciation expense) which the Commission had to allocate, and its reasons for allocating property taxes are obviously the same as those supporting its similar allocation of the other fixed costs.[12] Certainly, the Commission was not required to reiterate in detail the reasons for its allocation with respect to each of the innumerable fixed cost items.

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these sales to a substantial degree at all other times of the year. *Re Atlantic Seaboard Corp.*, 94 P. U. R. (N. S.) 235, 246; see, also, *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 U. S. 581, 615 (Mr. Justice Jackson concurring). Since Northern's pipelines are used almost to capacity with a 95% load factor (R. I 275; II 753), Northern's emphasis on the demand element has the effect of seeking to add "an artificial and exaggerated incentive for the making of dump sales of natural gas for industrial uses" (R. V 2310, Commissioner Smith concurring).

[12] Northern's witness conceded that return on rate base and income taxes should be allocated 50% to demand and 50% to commodity (see R. V 2285–2286); [illegible] fixed costs are patently indistinguishable for purposes of allocation from property taxes and depreciation.

3. *Rate Schedules IND–1 and IND–2 are within the Commission's jurisdiction and authority to suspend.* Section 4 (e) of the Act, *infra,* pp. 27–28, authorizes the Commission to suspend rates on all sales subject to its jurisdiction, except sales for resale "for industrial use only." Northern urges that IND–1 was not subject to suspension since it related to sales for resale for industrial use only and so was removed from the Commission's suspension authority by the foregoing proviso in Section 4 (e) (Pet. in No. 382, pp. 34–36). As to Schedule IND–2, Northern claims that it related to sales to the distributing utilities for their own use, and not to sales for resale, so that under Section 1 (b) of the Act, *infra,* p. 26, it was completely exempt from Commission regulation (Pet. in No. 382, pp. 31–34).

In *United States* v. *Public Utilities Commission,* 345 U. S. 295, where electric power delivered for resale and direct consumption was commingled, this Court held that all the power was within the Commission's authority over sales for resale since there was no "record evidence of separate rates, separate negotiations, separate contracts or separate rate regulation by official bodies"; in short, there was a complete absence of "an essentially separate transaction covering the power directly consumed by the purchaser [which] is identifiable." 345 U. S. at 318. See, also,

California Electric Power Co. v. *Federal Power Commission,* 199 F. 2d 206, 210 (C. A. 9), certiorari denied, 345 U. S. 934.

The record here requires the same conclusion. The record shows, as both the Commission and the court below found, that Northern's deliveries of gas to distributing companies for their own use and for resale for industrial use were not identifiably separate from the deliveries for resale generally (R. V 2261–4; VI 2444–51). IND–1 and IND–2 were at most partial schedules relating to the commodity element of the sale and so were inseparably tied in with and dependent upon the CD–1 Schedule relating to sales for resale for all uses.[13]

Moreover, not only was all of the gas sold to a distributing company delivered in a single homogenous mass, but it was available for all uses the purchasing company might wish to make of it. There was no earmarking of gas for a particular use, much less an understanding or contractual arrangement that any part of the gas was to be used for industrial resales or for consumption by the company itself. At the time of delivery to the distributing companies, the use to which the gas would ultimately be put was unknown.

[13] IND–1 and IND–2 provided that they were available only to gas utilities which purchased "Contract Demand under Northern's Rate Schedule CD–1" (R. V 2170, 2171, 2213, 2214).

Some distributors commingled the purchased gas with their own manufactured gas with the result that there was no way of determining the ultimate destination of the purchased gas. At times all of the gas was used to meet the needs of the firm, non-industrial customers, but at other times, during off-peak periods, for example, part of the gas was available for the company's own use or for resale on an interruptible basis for industrial use (R. VI 2446).[14] In short, the sales purportedly covered by IND–1 and IND–2 were inextricably commingled, from both a physical and contractual point of view, with Northern's sales for general resale, and, accordingly, were within the Commission's authority under the Act to regulate and suspend as sales for resale.

City of Hastings v. *Kansas-Nebraska Natural Gas Co.*, 98 P. U. R. (N. S.) 1, relied on by Northern (Pet. in No. 382, pp. 32–33), is entirely consistent with the result here. In contrast to the present case, the facts there showed that "the parties had effectively established separate rates for separate sales under two separate contracts" (R. VI 2448–2449). Moreover, in the *City of Hastings* case, there was a long subsisting con-

[14] Thus, gas available for resale to large industrial users because not needed by the firm customers was not sold to the distributing utility "for resale for industrial use *only*" and, hence, does not even come within the terms of the proviso of Section 4 (e). Cf. R. V 2263; VI 2447.

tractual relation between the natural gas company and the distributor as to the latter's use of the gas (R. VI 2448); here, there not only was no contractual arrangement, but Northern filed IND–1 and IND–2 for the first time in 1950 for the purpose of defeating, in part at least, the Commission's jurisdiction and authority to suspend (R. VI 2446; see, also, R. I 116–117, 129–130, 140).

In these circumstances, the Commission's ruling, essentially factual in nature and supported by substantial evidence, is conclusive. Section 19 (b) of the Natural Gas Act. The affirmance by the court below was clearly proper, and further review by this Court is unwarranted. See *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U. S. 474, 490–491; *National Labor Relations Board* v. *Pittsburgh SS Co.,* 340 U. S. 498, 502–503.

CONCLUSION

The decision below is plainly correct to the extent it has been attacked by petitioners. The court below has properly followed the standards governing review of administrative determinations and has correctly applied the pertinent decisions of this Court. There is no conflict of decisions and no need for further review. It is, therefore, respectfully submitted that the petitions for certiorari should be denied.

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APPENDIX

1. The Natural Gas Act (52 Stat. 821, 15 U. S. C. 717 *et seq.*) provides in pertinent part:

SEC. 1.

* * * * *

(b) The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

SEC. 4.

* * * * *

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring

the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided,* That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go

into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix

the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

SEC. 19.

* * * * *

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection

shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. * * *

2. The Administrative Procedure Act (60 Stat. 237, 5 U. S. C. 1001 *et seq.*) provides in pertinent part:

SEC. 8. In cases in which a hearing is required to be conducted in conformity with section 7—

* * * * *

(b) SUBMITTALS AND DECISIONS.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency

action is by law committed to agency discretion—

* * * * *

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

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